

**BAR  
STANDARDS  
BOARD**

REGULATING BARRISTERS

**Professional Conduct Department  
Trends and Performance**

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**2011 Year End Report**

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## Executive Summary

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- 0.1 The Professional Conduct Department (PCD) investigates complaints and, where appropriate, assists the Professional Conduct Committee (PCC) in taking action against barristers who have breached the Code of Conduct. This is the year-end report for the PCD providing a summary of the Department's activities for the period 1 January to 31 December 2011.
- 0.2 The report is divided into two main sections: *Trends in professional misconduct*, which gives an overview of the numbers and types of complaints handled within the Department during 2011; and *Turn round times and throughput of complaints*, which is concerned primarily with the time taken to process complaints and the volume of work carried out by the Department during the year.
- 0.3 Several important factors influenced the work of the Department in 2011, as set out below, and are referred to throughout the report:
- a. **Restructure:** The first quarter of 2011 began with a significant restructure of the decision making processes and the staff teams, including substantial revisions to the Complaints Rules (Annex J to the Code).
  - b. **Delegated Authority:** The restructure included the abolition of the post of Complaints Commissioner with the functions of the Commissioner transferred to the PCC in January 2011. Staff members in the PCD were given authority by the PCC to take some decisions including dismissal of complaints and referral of some types of internal complaints directly to disciplinary action.
  - c. **Legal Ombudsman:** The Legal Ombudsman (LeO) assumed jurisdiction over complaints of inadequate professional service (IPS) on 6 October 2010. However, the BSB retained jurisdiction over IPS complaints received before 6 October 2010 until 31 March 2011, at which point all outstanding complaints were transferred to the Acting Legal Services Ombudsman. At that stage it was intended that a charge would be levied by the Ministry of Justice (MoJ) for completion of each case. Considerable resources were put into concluding as many IPS complaints as possible prior to 31 March 2011 – with positive effect – and as a result the MoJ confirmed in November 2011 that no charge would be applied; a saving to the BSB of up to £24,000.
- 0.4 Set out below is a summary of the main statistical findings in relation to each section of the report:

## Trends in Professional Misconduct

- a. The number of external complaints received by the BSB was at the same level as 2010, despite a significant decrease in the number of complaints from clients of barristers. LeO now has jurisdiction over all client complaints in the first instance and identified issues of misconduct in 3% of complaints received in 2011 – considerably below the prediction that at least 25% of complaints would involve issues of both service and conduct.
- b. The decrease in client complaints was balanced by a considerable increase in the number of non-client complaints. This can be entirely attributed to an increase in the number of complaints from litigants in person; from 7 in 2010 to 76 in 2011. Litigants in person have been found to make a disproportionately high number of allegations of “misleading the court”.
- c. Allegations of discreditable conduct/dishonesty remain the most frequently occurring aspect for external complaints with 42% of complaints featuring this aspect. This is unsurprising considering the wide range of behaviours constituting potential breaches of paragraph 301 of the Code.
- d. The number of internal complaints opened increased significantly compared with the previous two years with 289 complaints opened compared with 171 in 2010. This was caused by a substantial increase in the number of referrals from Bar Council Records of barristers failing to renew (or pay instalments on) their practising certificate. The overall figure is especially notable as it does not include the majority of the annual CPD referrals as the first batch was only received in December 2011.
- e. Referrals to Disciplinary Tribunal returned to the level seen in 2009 with 151 complaints referred – an increase of 37% on 2010. This is in line with the increase in the number of internal complaints opened. Of the practising certificate complaints opened in 2011, 40 (24%) were referred to Disciplinary Tribunals by the PCC by the end of the year.
- f. The total number of complaints closed remained at a similar level to previous years, with 613 complaints closed compared with 592 in 2010. However the 207 complaints closed in the fourth quarter was the highest quarterly figure on record as a result of decisions by the Experienced Members (EM) of the Committee to dismiss 58 complaints about failure to pay the practising certificate fee under the instalment scheme.
- g. Staff decisions to close complaints accounted for the largest proportion of complaint closures (34%) – a slightly smaller proportion than the Commissioner closed in 2010 (41%) but a substantial return on the authority given to the PCD

staff members in January 2011. The dismissal rate for external complaints followed a similar pattern to previous years with three quarters of complaints dismissed; due in the main to a lack of evidence to support the allegations made. Internal complaints remain considerably more likely to be upheld.

- h. The rate at which complaints were upheld following a referral to Disciplinary Tribunal fell from 93% in 2010 to 84% with 20 cases resulting in no charges being proved.
- i. Fourteen complaints resulted in disbarments in 2011, applying to twelve separate barristers.
- j. The number of complaints awaiting an appeal fell from 32 at the time of the 2010 Annual Report to a current figure of 21.

### **Turn Round Times and Throughput of Complaints**

- a. Dismissals of external complaints without investigation remained comparable to 2010 with 62% (90) of complaints closed inside 3 months. However, where a quick decision was possible, there is evidence to suggest that turn round times have improved.
- b. Turn round times for dismissals of external complaints following investigation increased overall compared with 2010 with 39% (29) of complaints taking more than 12 months to conclude compared with 24% (16) in 2010. Internal dismissals showed similar figures to 2010.
- c. Turn round times for external complaints following disciplinary action remained at a similar level to 2010 with 50% (7) of complaints taking more than 18 months to conclude. This continues to demonstrate that, where such complaints are referred for disciplinary action, external complaints are taking considerably longer to close than internal complaints. Any improvements made to the system have been counteracted by the increasingly litigious nature of disciplinary proceedings.
- d. Internal complaints closed following disciplinary action displayed a mixed picture in 2011 which overall resulted in similar turn round times to 2010; with 47% (51) of complaints concluded within 12 months compared to 43% in 2010. This was caused for the most part by delays with five person Disciplinary Tribunals.
- e. Despite the closure of 459 internal complaints, a large number of internal complaints (200) were carried over into 2012 with the majority of the 2010 CPD referrals still to come. There is a high probability that the volume of internal complaints within the PCD in 2012 will have a negative impact on both internal and external turn round times.

- f. There is evidence to suggest that the restructured processes are producing improvements in the time taken to progress and close complaints. Of the external complaints received in the first six months of 2011, 81% were closed by the end of the year compared with 65% in 2010. In addition, ten of the practising certificate referrals opened in May 2011 made it all the way to Disciplinary Tribunal and closure within the same calendar year. No practising certificate or CPD referrals were concluded in this way in 2010. There are, however, areas where no improvement has been observed.

## **Conclusions**

- 0.5 Overall, 2011 was yet another year of substantial change within the complaints and disciplinary system and in the work of the PCD and PCC. Based on the statistics summarised above and the detailed contents of the report, the headline trends for the year were:
- a. The introduction of the restructured processes and staff teams was a huge learning curve for all those involved and it is to the credit of the staff and the Committee members that the transition to the new structure went so smoothly with relatively little negative impact on overall performance. The restructure coincided with the need to complete as many as possible of the outstanding IPS complaints by the deadline of 31 March 2011. Again, the staff and Committee are to be commended for their hard work in this area which resulted in far fewer cases than predicted being referred to the Acting Legal Services Ombudsman and the consequent decision by the MoJ not to charge for completion of these cases; a saving to the BSB of up to £24,000.
  - b. The introduction of the Legal Ombudsman scheme has had a significant effect on the operation of the Bar's complaints and disciplinary system. The level of referrals has been significantly less than predicted and overall amounted to only 3.2% of complaints received by LeO. While this could be a cause for concern, the checks that have been put in place indicate that there are no apparent problems in relation to LeO's assessment of conduct issues. To some extent this is borne out by the BSB's previous figures in relation to misconduct referrals to disciplinary action arising from client complaints, which were only 3% of the total complaints.
  - c. Although the number of referrals in relation to client complaints has been much lower than predicted, this has not led to a substantial reduction in the number of external complaints received. The level of external complaints has been maintained almost entirely by the substantial increase in complaints from litigants in person which rose from 7 in 2010 to 76 in 2011.
  - d. As has been commented on in previous reports, the increase in complaints from litigants in person is likely to be a direct result of the changes in access to legal aid

which mean more people are having to represent themselves. A thematic review of the complaints received from litigants in person is due to be carried out later in 2012 with a view to providing greater feedback to the profession about issues that may arise and establishing if there are any lessons to learn.

- e. While external complaint numbers remained relatively static, the workload within the PCD increased due to a substantial increase in referrals in relation to breaches of the practising certificate requirements which went from 11 in 2010 to 169 in 2011. However, the extent of the potential increase in internal complaints is masked by the very late referral of breaches of the 2010 CPD requirements which are normally received in April/May each year but, as at March 2012, the main bulk of the referrals have yet to be received.
- f. The statistics in relation to internal complaints outlined in this report highlight the increasing dominance of such complaints within the system. Even without the CPD referrals, internal complaints formed almost 50% of the complaints opened in 2011 as compared to 30-35% in previous years. Further, internal complaints formed over 80% of the cases referred to disciplinary action in 2011. As part of the work in relation to the regulatory standards due to be carried out in 2012, the issue of supervision and enforcement in these areas will be considered in order to ensure that the regulatory action remains appropriate and proportionate.
- g. It was hoped that by the end of 2011 a clear assessment could be made in relation to the impact on the system of the restructure. However, the factors referred to above have to some extent made this difficult. The results are mixed with clear improvements in the time taken to progress complaints in some areas and static results in others resulting in the picture remaining the same as in previous years. However, it is apparent that the cases where there is no evidence of a potential breach of the Code are being turned round more quickly and complainants informed earlier of the outcome. It is also apparent that the new ability for staff to refer cases direct to disciplinary action has created substantial improvements in the time taken to conclude disciplinary action in relation to internal complaints.

0.6 There can be no doubt that the complaints landscape has changed over the last year and the PCD and PCC's work is now centred on dealing with complaints from non-clients and addressing issues arising from breaches of the practising requirements. The Independent Observer's positive assessment of the operation of the system is very encouraging and her recommendations have added to the continual cycle of improvements. The review of the efficacy of the restructured processes will be another opportunity to ensure that the system is working effectively in line with good practice.

## Introduction

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- 1.1 The Professional Conduct Department (PCD) works under the authority of the Professional Conduct Committee (PCC). The Department investigates complaints and, where appropriate, assists the Committee in taking action against barristers who have breached the Code of Conduct.
- 1.2 This is the year-end report for the PCD providing a summary of the Department's activities for the period 1 January to 31 December 2011. The report focuses on the key trends in complaints received or raised by the BSB and the outcomes of complaints. It also covers the Department's and the Committee's performance in handling complaints.

## Format of the Report

- 1.3 The report is divided into two main sections: *Trends in professional misconduct*, which gives an overview of the numbers and types of complaints handled within the Department during 2011; and *Turn round times and throughput of complaints*, which is concerned primarily with the time taken to process complaints and the volume of work carried out by the Department during the year.
- 1.4 The BSB now only has jurisdiction to deal with complaints about barristers' conduct following the transfer of the previous jurisdiction over service complaints – known as complaints of inadequate professional service or IPS – to the Legal Ombudsman in October 2011. The BSB continued to deal with outstanding IPS complaints until the end of the first quarter of 2011 but in order to ensure the statistics are consistent, can be accurately compared and remain applicable to BSB work going forward, all complaints of IPS are excluded from the statistics in this report.
- 1.5 Complaints are generally broken down according to the source of the complaint i.e. 'internal' complaints raised by the BSB of its own motion, and 'external' complaints received from clients, members of the public, solicitors or other professionals and organisations. Where paragraphs refer solely to internal or external complaints they will be highlighted in bold as **Internal** or **External**.
- 1.6 The statistics in this report are based on data extracted from the complaints database at the beginning of February 2012, but relate only to complaints handled during 2011.

## Background to 2011

- 1.7 Several important factors influenced the work of the Department in 2011, as set out below, and need to be borne in mind when considering the contents of this report.



➤ **Restructure**

1.8 As outlined in the Annual Performance Report for 2010, the first quarter of 2011 began with a significant restructure of the decision making processes and the staff teams. This included: substantial revisions to the Complaints Rules (Annex J to the Code); development of detailed written policies and procedures to support the Rules; significant adaptations to the database; changes to the job descriptions for all members of staff; and training on these changes for all members of the Committee. This created significant upheaval, including the transfer of hundreds of cases between staff members, and inevitably impacted on performance throughout the year but particularly in the first two quarters. This report assesses the impact of the restructure and the *Turn round times and throughput of complaints* section features a sub-section dedicated to this.

➤ **Delegated Authority**

1.9 The restructure referred to above also included the abolition of the post of Complaints Commissioner which was a post created primarily to provide a level of independence in the consideration of service complaints. Prior to the restructure in January 2011, all external complaints were assessed in the first instance by the Complaints Commissioner; who took decisions on whether to dismiss them or refer them onto the Committee. In light of the creation of the Legal Ombudsman and the need to speed up the consideration of complaints, the functions of the Commissioner were transferred to the PCC in January 2011 with staff members in the PCD being given authority by the PCC to take some decisions including: dismissal of complaints where there is no evidence of a breach of the Code and referral of some types of internal complaints directly to disciplinary action.

➤ **Legal Ombudsman**

1.10 The Legal Ombudsman (LeO) assumed jurisdiction over complaints of inadequate professional service (IPS) on 6 October 2010. As a result no new complaints of IPS have been opened since that date. However, the BSB retained jurisdiction over IPS complaints received before 6 October 2010 until 31 March 2011, at which point all outstanding complaints were transferred to the Acting Legal Services Ombudsman. At that stage it was intended that a charge would be levied by the Ministry of Justice (MoJ) for completion of each case. It was therefore an organisational priority to try to conclude as many IPS complaints as possible prior to 31 March 2011. Considerable resources were put into doing this which inevitably impacted on the progress of other complaints.

1.11 As outlined in the First Quarter Report<sup>1</sup>, there were 93 outstanding IPS complaints at the start of 2011 and it was predicted in August 2010 that 40 complaints would need to be transferred to the Acting LSO. Based on a case fee of £600, as indicated by the MoJ,

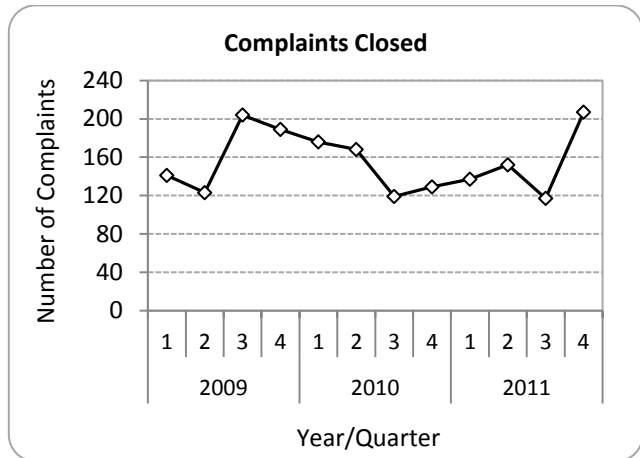
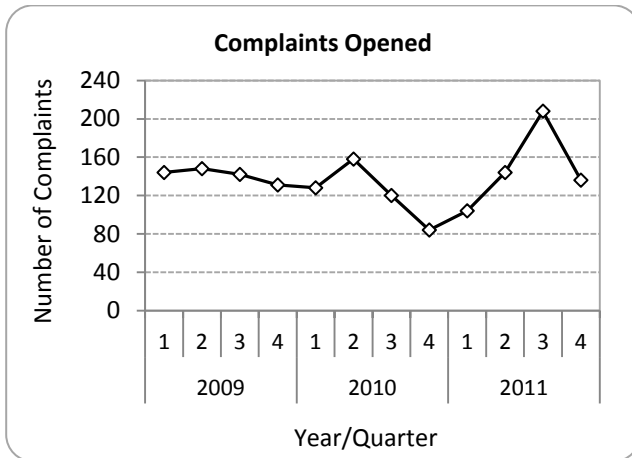
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<sup>1</sup> Professional Conduct Department: Trends and Performance Report, First Quarter 2011; Paragraphs 2.10 – 2.11

this would have equated to a total cost of £24,000. Following considerable effort on the part of the PCD and Committee the final figure stood at 34 complaints, 6 of which were accepted by LeO, leaving just 28 to be transferred to the Acting LSO. Given the low level of cases referred, the MoJ confirmed in November 2011 that it would not be applying a charge for completion of the IPS complaints. Both Sara Down as Head of the PCD and Simon Lofthouse QC as Chair of the PCC would like to record their thanks to the PCC and the PCD for their hard work in bringing this about.

## Overview of General Trends

Including Comparisons with Previous Year



Complaint Volumes		Comparison with 2010	
Active complaints at start of year	391	↓	466
New complaints opened	592	↑	490
➤ Legal Ombudsman referrals	33	–	–
Complaints reopened	17	↓	27
Complaints closed	613	↔	592
Active complaints at end of year	387	↔	391

Performance & Outcomes		Comparison with 2010	
Referrals to DBC or Disciplinary Tribunal	174	↑	135
➤ Referred within 6 months of the complaint being opened	59%	↓	63%
Disciplinary Tribunals resulting in a finding	84%	↓	93%
Complaints resulting in disbarment	14	↑	9
Dismissals without a referral to disciplinary action	355	↑	308
➤ Percentage of all complaints closed	60%	↑	53%
➤ Closed within 6 months of the complaint being opened	71%	↔	70%

## Trends in Professional Misconduct

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### Complaints Received/Opened

#### ➤ Overview

- 2.1 The total figure for complaints received either from external sources or raised by the BSB of its own motion was 21% higher than 2010; with 592 new complaints opened compared with 490 last year. This was the highest level for three years but, as Table 1 indicates, the composition in relation to the source of complaints has changed significantly since 2007.

**Table 1: Complaints opened – annual comparison 2007 to 2011**

Source	2007	2008	2009	2010	2011
External	485	368	403	319	303
Internal	106	307	162	171	289
<b>Total</b>	<b>591</b>	<b>675</b>	<b>565</b>	<b>490</b>	<b>592</b>

- 2.2 **External:** As Table 1 shows, the number of external complaints received in 2011 was at the same level as the previous year with 303 complaints opened compared to 319 in 2010. This only amounts to a 5% decrease despite the number of referrals from the Legal Ombudsman (LeO) in relation to conduct matters being lower than anticipated (see paragraph 2.5).
- 2.3 **Internal:** The number of internal complaints opened increased significantly compared with the previous two years with 289 complaints opened compared with 171 in 2010 – an increase of 69%. The trends in internal and external complaints are explored further in the following sections.

#### ➤ Trends in External Complaints Received

- 2.4 **Complaints received:** The number of external complaints received remained consistent at 72-80 per quarter for the whole of 2011. Figure 1 indicates that prior to the introduction of LeO in October 2010 the quarterly figure was generally 80-100<sup>2</sup>. External complaints can be received from both clients of barristers and non-clients such as opposing litigants, solicitors and witnesses. As LeO now has jurisdiction over all client complaints in the first instance, the reduction in external complaints since 2010 can be attributed to a reduction

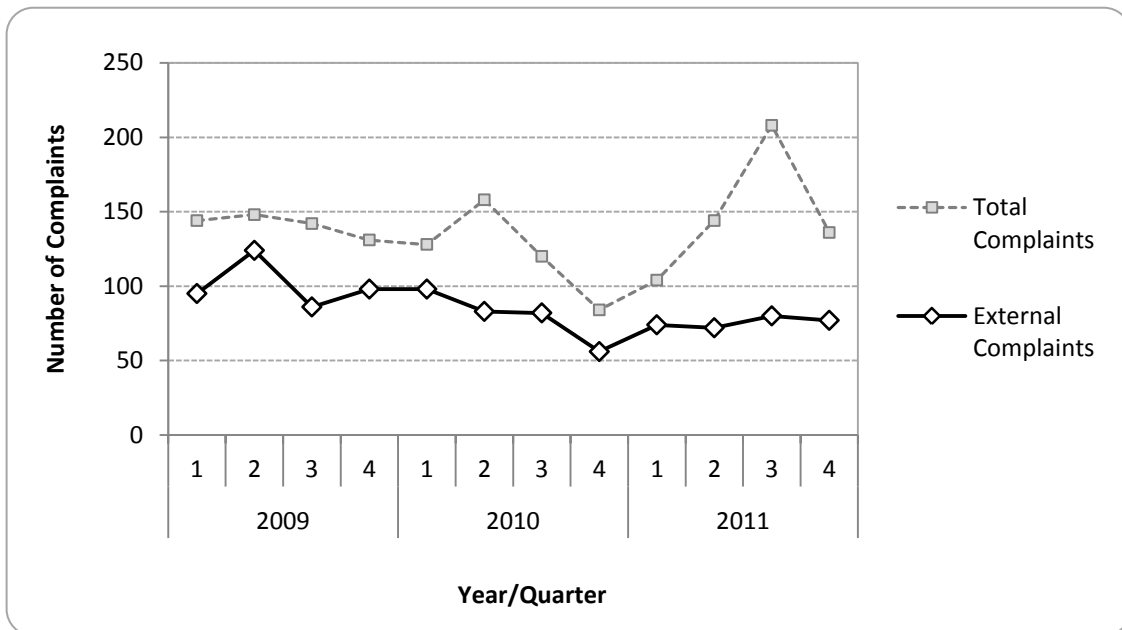
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<sup>2</sup> Quarterly figures from 2008 to 2010. The only quarterly figure outside the 80-100 range was the second quarter of 2009 at 124 complaints.

in complaints about conduct from clients of barristers. This reduction is, however, more significant than the figures above would suggest.

2.5 Prior to the introduction of LeO, the BSB was identifying issues of potential misconduct in 40% of client complaints. The following paragraphs indicate that in 2011 LeO identified potential misconduct in just 3% of the client complaints received. It is therefore clear that the BSB was registering issues of misconduct in a significantly higher proportion of client complaints than the Legal Ombudsman (see paragraphs 2.8 to 2.9). The overall figures have been balanced to some extent by an increase in the number of non-client complaints received by the BSB where the figure for 2011 was 22% higher than 2010 (273 compared with 223 in 2010). This can be entirely attributed to an increase in the number of complaints from litigants in person (see paragraphs 2.14 –2.17).

**Figure 1: External complaints opened – quarterly comparison 2009 to 2011**



2.6 **Legal Ombudsman (LeO):** The Legal Ombudsman now receives all complaints from clients about their barristers and it is LeO that assesses whether a client complaint includes issues of conduct that should be referred to the BSB; based on criteria provided by the BSB. (Non-client complaints remain solely under the jurisdiction of the BSB and are made direct to the BSB).

2.7 Statistics provided by LeO (Table 2) show that 503 complaints were received about registered barristers in total in 2011 with potential misconduct identified in 16 of these cases to date. Equating to 3.2% of all complaints, this is considerably below original expectations based on the prediction made in 2010 that at least 25% of complaints would involve issues of both service and conduct.

**Table 2: Status of complaints received by the Legal Ombudsman – quarterly comparison**

Status	2011 1 <sup>st</sup> Quarter	2011 2 <sup>nd</sup> Quarter	2011 3 <sup>rd</sup> Quarter	2011 4 <sup>th</sup> Quarter
Misconduct Cases	10	2	4	0
Cases Accepted for resolution	57	54	76	34
Complaints Not Yet Accepted for resolution	0	0	0	3
Complaints Not Accepted for resolution	22	13	17	21
Premature Cases / Complaints	35	53	51	51
<b>Total</b>	<b>124</b>	<b>122</b>	<b>148</b>	<b>109</b>

2.8 The significant reduction in client complaints about conduct would appear at first blush to indicate that issues of misconduct are not being properly identified. However, the checks and balances put in place to monitor referrals from LeO show that this is not the case. During the first six months of LeO’s operation all complaints received by LeO about barristers were forwarded to the BSB to allow checks to be made to ensure that issues of conduct were being identified correctly. These checks confirmed that conduct issues were being correctly identified. Further the Operational Protocol between LeO and the BSB provides for ongoing annual checks<sup>3</sup> of 10% of all complaints received by LeO about barristers. The annual checks were carried out towards the end of 2011 and this exercise again confirmed that, on the whole, issues of conduct are being identified. While in a few cases, the reviewers considered that there might, in theory, have been conduct issues that could have been referred, in all cases the view was that LeO’s judgement in not referring the matters was sound and the potential issues would not have been ones the BSB would have taken forward. While the BSB does not have any concerns about LeO’s ability to identify issues of misconduct it is clear that there has been a reduction in this area since jurisdiction over client complaints passed to LeO.

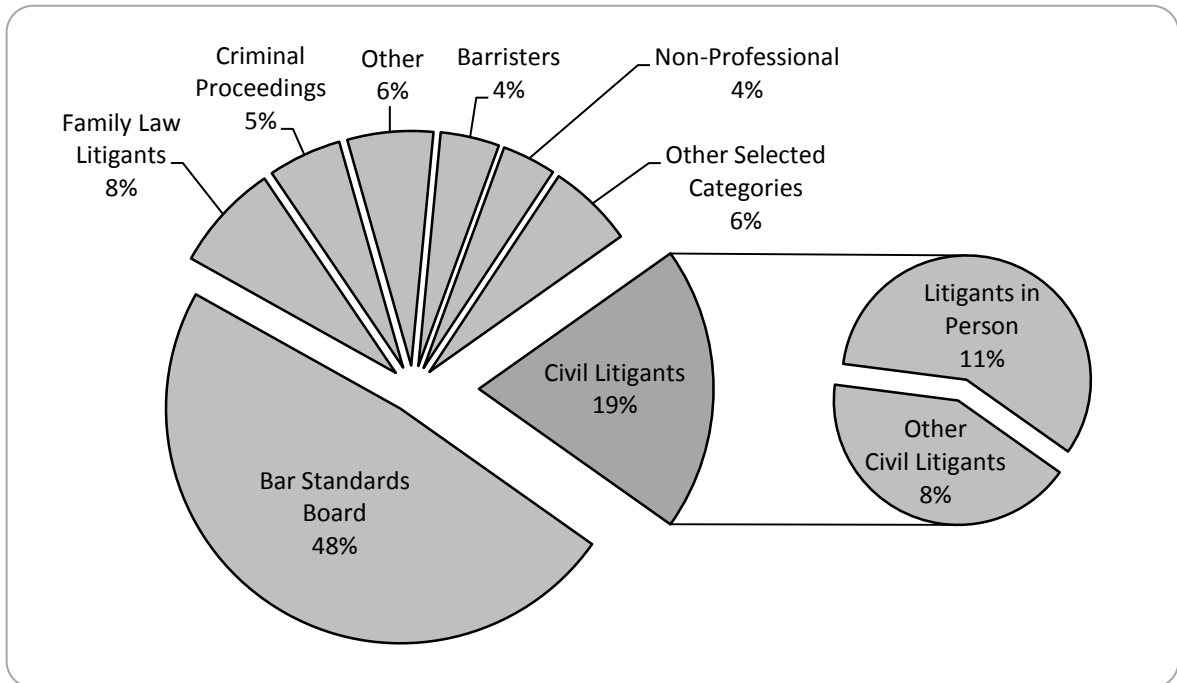
2.9 One reason for the reduction in registration of conduct issues in relation to client complaints may lie in the fact that previously the BSB were actively looking for any indication of potential misconduct when first assessing client complaints (and then proceeding to dismiss if no supporting evidence was provided) whereas LeO’s remit under the Legal Services Act 2007 is to deal with service issues and only flag issues of misconduct as and when they become apparent. In relation to this point, it should be noted that prior to the introduction of LeO, the BSB identified potential issues of misconduct in 40% of client complaints received but only referred approximately 3% of client complaints to disciplinary action for professional misconduct. While these statistics are still below the current rate of action in relation to conduct referrals from LeO, they

<sup>3</sup> Outlined under paragraph 22 of the Operational Protocol between the BSB and the Legal Ombudsman

indicate that the system is not failing to identify issues of conduct that warrant further investigation and disciplinary action.

- 2.10 LeO referred a total of 33 complaints<sup>4</sup> to the BSB in 2011, 30 of which were converted to full complaints<sup>5</sup>. Therefore, LeO referrals made up 10% of all external complaints received in 2011.
- 2.11 **Complainant category:** Figure 2 illustrates that the largest source of complaints overall was the BSB (48%) – as is usually the case given the PCD’s responsibility for matters such as compliance with CPD and other practicing requirements. For external complaints in 2011: civil litigants (116) continued to be the largest source of complaints followed by family law litigants (44); with similar numbers to 2010. The number of complaints received in relation to criminal cases decreased from 66 in 2010 to 30 in 2011. The decrease relates to complaints from criminal defendants rather than non-defendants. Defendants in criminal cases would for the most part be clients complaining about their barrister and the decrease therefore correlates to the decrease in conduct complaints generally from clients (see paragraphs 2.4 – 2.9 above).

**Figure 2: Complaints opened in 2011 by complainant category**



<sup>4</sup> The 33 complaints included complaints received by LeO in 2010 and complaints about unregistered barristers which are outside of LeO’s jurisdiction. This figure is therefore different from the 16 complaints with issues of misconduct listed in Table 2.

<sup>5</sup> The difference in the referral and conversion numbers arises from the BSB’s assessment that some of the LeO referrals did not in fact include issues of conduct

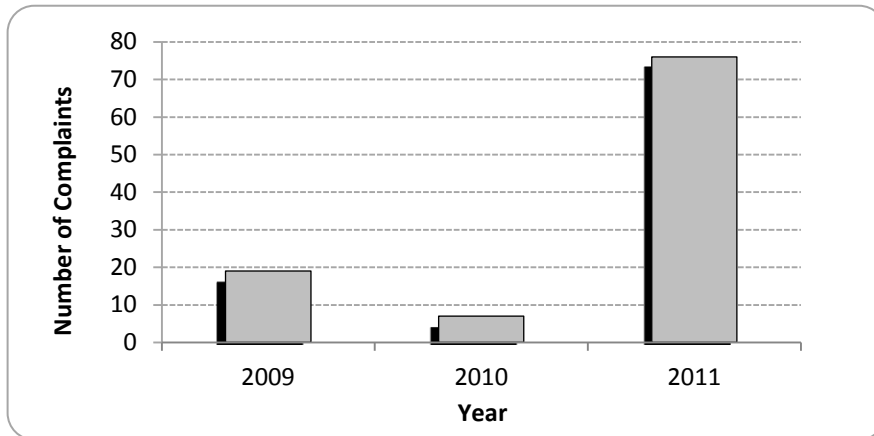
- 2.12 Amongst the smaller groups of complainants, 2011 saw an increase in complaints from barristers about fellow barristers from 10 in 2010 to 24 in 2011, although as reported in the Third Quarter Report<sup>6</sup> there were a number of linked complaints. Nonetheless this may indicate an increasing concern within the profession to retain the high standards which the Bar values so strongly.
- 2.13 A change to the recording of complainant categories in 2011 allowed for 'non-professional' complaints to be analysed for the first time. These are complaints received against barristers that are unconnected with their work as a barrister and instead relate to their actions outside their provision of legal services. There were 22 such complaints over the course of the year; mainly relating to debts, failures to comply with court orders and general behaviour categorised under paragraph 301 of the Code (bringing the Bar into disrepute/dishonest or discreditable conduct). In many cases the complainant was advised to consider taking legal advice or taking their complaint to another body (such as the police where allegations may have amounted to criminal activity) in the first instance. It should be noted that the Committee's policy is that it will not normally intervene in private disputes about debt: however, where a complainant has pursued the debt through the courts, and obtained a judgement against a barrister with which the barrister has wilfully failed to comply, then disciplinary action will be considered.
- 2.14 **Complainant category > Litigants in Person:** The increase in the number of complaints from litigants in person reported in the three quarterly reports for 2011 was maintained throughout the year, making this a significant and sustained trend. The BSB consistently received 17 to 21 complaints per quarter adding up to a total of 76 complaints for the year compared with 19 in 2009 and 7 in 2010. The majority of these (88%) were in relation to civil cases. While there should be a note of caution in relation to the figures from previous years due to the way in which such complaints were recorded, there can be no doubt that there has been a significant increase as Figure 3 shows. This unprecedented increase in complaints from litigants in person is inevitably due to the cuts in legal aid which have forced more people to represent themselves.

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<sup>6</sup> Professional Conduct Department: Trends and Performance Report, Third Quarter 2011; Paragraph 2.12



**Figure 3: Complaints received from litigants in person – annual comparison 2009 to 2011**



- 2.15 Allegations of misleading the court feature in 51% (39) of complaints received from litigants in person compared with an average of 31% across all external complaints. To date 27 of these complaints have been dismissed with the remainder ongoing. None of the complaints have been referred to disciplinary action to date which reinforces the comments made in previous reports that allegations of misleading the court from litigants in person are likely to arise from misunderstandings on the complainants' part of the role of opposing counsel in proceedings.
- 2.16 Allegations of 'discreditable conduct/dishonesty' also feature highly for litigants in person – appearing in 42% of complaints. However, this is in line with the average for external complaints. Of all of the complaints received from litigants in person, only one has been referred to a Disciplinary Tribunal to date, with charges raised in relation to 'holding out'.
- 2.17 A working group of the Civil Justice Council (CJC)<sup>7</sup> recently reviewed the position of litigants in person within the court system with a view to assessing what steps can be taken to improve access to justice for litigants in person and to prepare for the possibility of a material increase in such litigants. It made a number of recommendations focused on improving and increasing access to information and support for litigants in person. The recommendations included the publication of guidance for legal professionals representing a party against a litigant in person and also a statement of what litigants in person are entitled to expect from legal professionals representing other parties in a case. The BSB plans to produce a thematic review later in 2012 of the complaints received in 2011 in order to provide a more detailed picture of the issues litigants in person raise regarding their interaction with barristers and potentially providing guidance to the profession.

<sup>7</sup> Civil Justice Council – Access to Justice for Litigants in Person (or self-represented litigants) – 11 November 2011

2.18 **Aspects<sup>8</sup> of complaints:** As was the case in 2010, allegations of discreditable conduct or dishonesty remained the most frequently occurring aspect for external complaints – with the number of complaints involving this aspect increasing from 99 in 2010 to 128 in 2011 and therefore appearing in 42% of complaints received. As detailed in the Third Quarter Report<sup>9</sup>, such allegations are recorded as potential breaches of paragraph 301 of the Code of Conduct: a paragraph which covers a wide range of behaviours. The current recording system does not allow for this category of complaints to be broken down further into sub-categories and such a development to the database so shortly before the new Code is due to be introduced would not be cost-effective. However, development of a new complaints database is planned for 2012 to coincide with the introduction of the new Code of Conduct and will hopefully allow for more detailed layers of sub-categorisation to be recorded.

**Table 3: Aspects opened for external complaints – annual comparison**

Aspect Description	2010	% of Complaints	2011	% of Complaints	+/-
Discreditable conduct / dishonesty	99	31.0%	128	42.2%	+29.3%
Misleading the Court	65	20.4%	95	31.4%	+46.2%
Rudeness/misbehaviour out of Court	24	7.5%	41	13.5%	+70.8%
Rudeness/misbehaviour in Court	25	7.8%	26	8.6%	+4.0%
Other	35	11.0%	23	7.6%	-34.3%
Incompetence	20	6.3%	10	3.3%	-50.0%
Fee dispute	28	8.8%	9	3.0%	-67.9%
HoC failing to administer chambers properly	5	1.6%	9	3.0%	+80.0%
Non-practising barrister holding out	7	2.2%	8	2.6%	+14.3%
Other Aspects	93	29.2%	71	23.4%	-23.7%
<b>Total Complaints</b>	<b>319</b>		<b>303</b>		

2.19 Table 3 above shows that the number of complaints received involving allegations of misleading the court also increased from 65 in 2010 to 95 in 2011; resulting for the most part from the increase in such complaints from litigants in person (see paragraph 2.15).

2.20 Rudeness/misbehaviour out of Court was the third most frequently occurring aspect in 2011 (14% of all complaints) and all other aspects were considerably smaller in number. However, amongst the smaller aspects, complaints of discrimination fell from 15 in 2010

<sup>8</sup> 'Aspects' denote the individual issues raised within one complaint. Therefore a complaint may consist of a number of aspects. The main issue of a complaint is referred to as the 'primary aspect'.

<sup>9</sup> Professional Conduct Department: Trends and Performance Report, Third Quarter 2011; Paragraph 2.13

to 7 in 2011 which may reflect the changes made to the Equality Guidance given to Chambers.

➤ ***Trends in Internal Complaints Opened***

2.21 **Complaints opened:** The figure of 289 internal complaints opened in 2011 was the highest annual total since 2008 and a 69% increase on the 171 complaints opened in 2010. This is especially notable as this figure does not include the majority of the annual referrals in relation to barristers failing to comply with the CPD requirements (for 2010), as the first batch was only received in December 2011. The high figures arose from a substantial increase in the number of complaints raised against barristers failing to renew (or pay instalments on) their practising certificate. Referrals by the Records Office of the Bar Council resulted in the raising of 169 complaints compared with 11 in 2010 and 21 in 2009. There were two reasons for this increase:

- a) Section 14 of the Legal Services Act 2007 made it a criminal offence for a barrister to carry out reserved legal activities without being authorised to do so. This came into effect on 1 January 2010. Prior to 2010, practising certificate referrals were dealt with first under the Warnings & Fines system which gave the barristers an opportunity to resolve the matter and pay an administrative fine rather than being subject to a formal complaint with a view to disciplinary action. However, in 2010 the PCC agreed that – given the increased seriousness of the offence – a different approach was required and therefore all practising certificate referrals would be raised as formal complaints without first passing through the Warnings & Fines system. As outlined in the Annual Report for 2010<sup>10</sup>, it is probable that the extensive publicity in 2009 regarding the introduction of section 14 to the Legal Services Act had a positive impact on the 2010 renewal figures that did not continue into 2011.
- b) A new instalment scheme for payment of the Practising Certificate Fee (PCF) was introduced in 2010 in a bid to assist the Bar with spreading the costs of payment. In that year no action was taken against defaulters because Code changes were required to allow for this. The relevant changes were made in late 2010 paving the way for 99 referrals in the third quarter of 2011 directly related to failures to pay the instalments. This level of default was unexpected and had a significant impact on the volume of work in the PCD as well as in the Records Office of the Bar Council where the initial monitoring and chasing of PCF payments is carried out. In light of this, the Finance and Audit Committee decided in 2011 that the level of default is not sustainable going forward and the option to pay by instalments will not be available in the future. Therefore, the spike in complaints related to defaults on instalments will be confined to 2011. It is disappointing that a facility that should

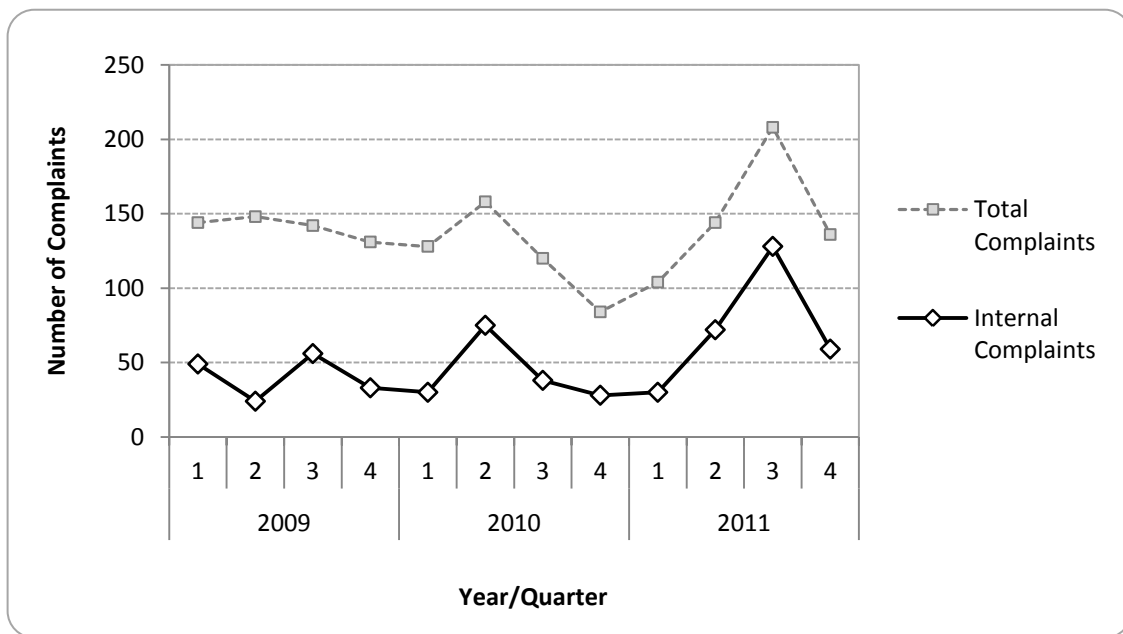
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<sup>10</sup> Professional Conduct Department: Annual Performance Report 2010; Paragraph 2.5

have benefitted the Bar had to be withdrawn due to the level of non-compliance with its terms

2.22 **Timing of referrals:** Figure 4 shows a pattern of referrals in previous years relating to practising requirements (CPD and practising certificate defaults) being received in the second or third quarters of the year, thus creating a spike in complaints opened and giving the work a “seasonal” feel. However, in 2011 the referrals in relation to practising certificate breaches were received in three distinct batches in the last three quarters of the year. Further, unlike in previous years, the first batch of CPD referrals (numbering 59) were not received until December of 2011. Therefore at the close of the calendar year these complaints (apart from those of eight “repeat offenders”) were still being dealt with as administrative matters under the Warnings & Fines system and no formal complaints had been raised in relation to them. Had the full number of CPD referrals been made earlier in the year, the number of internal complaints raised would have been higher than for any of the last ten years.

**Figure 4: Internal complaints opened – quarterly comparison 2009 to 2011**



2.23 **Aspects:** As outlined above, of the 289 internal complaints opened, 58% were raised against barristers for failing to renew their practising certificate – 104 for failing to renew (if not paying by instalment) or failing to pay the first instalment; and 65 for failing to pay the second instalment. The latter were technically raised as complaints of ‘discreditable conduct/dishonesty’ – as displayed in Table 4 – as the barristers had failed to pay rather than failed to obtain a practising certificate at all.

**Table 4: Aspects opened for internal complaints – annual comparison**

Aspect Description	2010	% of Complaints	2011	% of Complaints	+/-
Failure to renew practising certificate	11	6.4%	104	36.0%	+845.5%
Discreditable conduct / dishonesty	9	5.3%	84	29.1%	+833.3%
Failure to pay non-disciplinary fine	31	18.1%	20	6.9%	-35.5%
Failure to comply with CPD requirements	51	29.8%	18	6.2%	-64.7%
Failure to respond to BSB communications	22	12.9%	16	5.5%	-27.3%
Non-practising barrister holding out	9	5.3%	14	4.8%	+55.6%
Criminal convictions(s) - drink driving	9	5.3%	9	3.1%	0.0%
Failing to register or have insurance with BMIF	4	2.3%	7	2.4%	+75.0%
Criminal convictions(s) - other	10	5.8%	7	2.4%	-30.0%
Other Aspects	67	39.2%	49	17.0%	-26.9%
<b>Total Complaints</b>	<b>171</b>		<b>289</b>		

2.24 A total of 18 complaints were raised for failure to comply with CPD requirements – 10 from referrals carried over from the previous year and 8 complaints against “repeat offenders” from the December 2011 referrals. However, because of the timing of the CPD referrals in 2011 the overall figure for defaults in relation to CPD cannot yet be compared with the number for 2010. As at February 2012, a further 26 complaints had been converted from the December 2011 referrals.

2.25 In other areas, complaints opened against barristers failing to pay a non-disciplinary fine decreased for the second year running and those for failing to comply with a sentence of a tribunal/panel fell from 22 in 2010 to 6 in 2011. The latter is a reflection of both a decrease in the number of complaints at the disciplinary stage in 2011 and also an improvement in compliance (see paragraphs 2.44 – 2.45).

## Referrals to Disciplinary Action

2.26 **Disciplinary Tribunals:** Referrals to Disciplinary Tribunal returned to the level seen in 2009 with 151 complaints referred – an increase of 37% on 2010 as displayed by Table 5. This equates to 26 external complaints and 125 internal complaints and these are the proportions also observed in 2009. The increase in the number of internal complaints referred compared with 2010 is in line with the increase in the number of internal complaints opened. Of the practising certificate complaints opened in 2011, 40

(24%) were referred to Disciplinary Tribunals by the Professional Conduct Committee by the end of the year.

**Table 5: Complaints referred to disciplinary action – annual comparison**

Type	Source	2009	2010	2011
Disciplinary Tribunal	External	25	35	26
	Internal	132	75	125
	<b>Sub-total</b>	<b>157</b>	<b>110</b>	<b>151</b>
Determination by Consent	External	1	2	2
	Internal	32	23	21
	<b>Sub-total</b>	<b>33</b>	<b>25</b>	<b>23</b>
Adjudication Panel or Summary Hearing <sup>11</sup>	External	8	1	2
	Internal	43	0	0
	<b>Sub-total</b>	<b>51</b>	<b>1</b>	<b>2</b>

2.27 Whereas in the past the Committee made all referrals to disciplinary action, as a result of the restructure in 2011 PCD staff were given authority to refer some types of internal complaints directly to Disciplinary Tribunal and did so in 46 cases (30%). This did not, however, include the practising certificate cases<sup>12</sup>. Staff referrals will have reduced the overall time taken to refer complaints to disciplinary action and reduced the workload on the Committee. However, this in part will have contributed to the cancelling of four Committee meetings in 2011 due to a lack of complaints on the agenda – a situation explored further in the *Turn round times and throughput of complaints* section.

2.28 **Determination by Consent:** The number of Determination by Consent (DBC) referrals in 2011 was in line with the 2010 figure with 23 cases referred compared with 25 in the previous year. However, only 6 cases were referred to DBC in the second half of 2011. As the DBC procedure is most often used to deal with breaches of the CPD requirements, this reduction is a direct reflection of the delay in referring CPD cases and therefore it is likely that a substantial increase in DBC referrals will be seen in 2012.

<sup>11</sup> No longer available

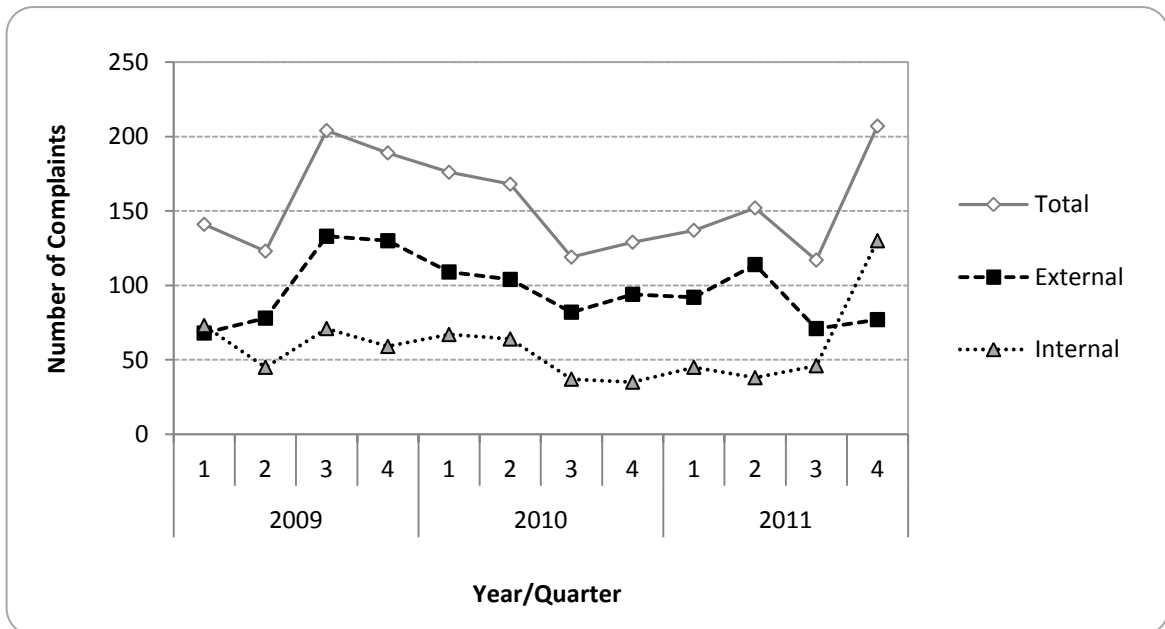
<sup>12</sup> Professional Conduct Department: Trends and Performance Report, Third Quarter 2011; Paragraph 2.18

## Complaints Closed – Decisions and Outcomes

2.29 **Complaints closed:** Complaints are closed once a final decision has been made as to the outcome. The outcome may be a dismissal, a decision to take “no further action” or a decision to uphold the complaint – either following disciplinary action or by means of an administrative fine or warning imposed by the Committee. In some circumstances complaints may be closed without a decision being taken, such as where a complaint is withdrawn.

2.30 The total number of complaints closed remained at a similar level to previous years, with 613 complaints closed compared with 592 in 2010. As Figure 5 indicates, the relatively small number of complaints closed reported in the third quarter of 2011 was counteracted to some extent by the fourth quarter figure – with the 207 complaints closed in the fourth quarter being the highest quarterly figure on record. This was caused by a large increase in the number of internal complaints closed as a result of decisions by the Experienced Members (EM) of the Committee to dismiss 58 complaints about failure to pay the practising certificate fee under the instalment scheme. In each case the instalment had been paid by the time of the conclusion of the investigation and it was thought proportionate to give the barristers formal advice rather than proceed to disciplinary action. Performance in relation to the number of complaints closed is explored further in the *Turn round times and throughput of complaints* section.

**Figure 5: Complaints closed – quarterly comparison**



## Decision sources

- 2.31 **Staff decisions:** Following the restructure of the decision making processes, 2011 was the first year where PCD staff had the authority to close complaints which do not reveal a breach of the Code. The move to allowing staff to take decisions was, in part, a replacement for the powers previously exercised by the Complaints Commissioner.
- 2.32 Accordingly, as summarised in Table 6, staff decisions to close complaints accounted for the largest proportion of complaint closures making up 34% of all closures. Of the 211 staff decisions, 173 (82%) were taken without an investigation by the Assessment Team of the PCD and 38 (18%) by the Investigation & Hearings Team following an investigation.

**Table 6: Decision sources for all complaints closed**

Decision Source	2010	% Total	2011	% Total
Staff Decision	-	-	211	34.4%
Disciplinary Tribunal	161	27.2%	121	19.7%
Complaints Committee	87	14.7%	88	14.4%
Experienced Members	0	0.0%	88	14.4%
Other	41	6.9%	51	8.3%
Chambers Referral	36	6.1%	20	3.3%
Determination by Consent	17	2.9%	19	3.1%
Office Holders	0	0.0%	13	2.1%
Directions Judge	0	0.0%	2	0.3%
Summary Hearing	0	0.0%	-	-
Legal Services Ombudsman	1	0.2%	-	-
Adjudication Panel	4	0.7%	-	-
Complaints Commissioner	245	41.4%	-	-
<b>Total</b>	<b>592</b>	<b>100.0%</b>	<b>613</b>	<b>100.0%</b>

- 2.33 Staff decisions accounted for 53% of external complaint closures in 2011. For comparison, the Commissioner closed 63% of external complaints in 2010; the difference in percentage in 2011 was made up by decisions taken by Experienced Members of the Committee and the Committee. For external complaints, the outcome of 76.4% of complaints closed in 2011 was a dismissal by the BSB compared to a figure of 77.5% in 2010 (see paragraph 2.39).



- 2.34 **“Comebacks”**: While there is no right of appeal against decisions to dismiss complaints, where the complainant writes back to the BSB objecting to the decision (known as a “comeback”) then the complaint will be referred to the next more senior decision maker based on which decision maker took the original decision. The complaint is then reviewed to decide whether the complaint should be reopened under Rule 41 due to the provision of new evidence or “some other good reason”<sup>13</sup>. Comebacks were received in relation to 28 staff decisions made in 2011 (and one EM decision).
- 2.35 Of the 24 comebacks reviewed to date, 21 had the original decision endorsed. In three cases the complaint was reopened on the grounds that new evidence was (or could be) supplied to support a potential breach of the Code. An additional 14 complaints were reopened in 2011 bringing the total for the year to 17 – a 37% decrease on 2010. This is because the most frequent reason for reopening a complaint (41% in 2011) is following a Chambers referral – a procedure that was used more regularly when the BSB had jurisdiction over IPS complaints.
- 2.36 **Experienced Member decisions**: In January 2011, again in part as a replacement for the powers of the Commissioner, “Experienced Members” of the Committee were given the authority to dismiss cases. An Experienced Member (EM) is defined as a lay or barrister member who has served two years or more on the Committee and decisions by EMs must be taken by two members – one lay and one barrister – acting together. In 2011, EMs made the decision to dismiss (16), dismiss with advice (70) or issue a warning (2) in 14% of all cases closed with 18 external complaints and 70 internal complaints closed (including the practising certificate cases referred to in paragraph 2.30). This made Experienced Members the second most common decision source for internal complaints after Disciplinary Tribunals – and the third most common overall – and highlights the value in using individual members of the Committee to take decisions without reference to a full meeting.
- 2.37 **Disciplinary Tribunals**: Despite a comparatively high number of Disciplinary Tribunals concluded in the fourth quarter of 2011 (43), the overall number of complaints closed at Disciplinary Tribunal decreased from 161 in 2010 to 121 in 2011. This is a direct consequence of the lower number of referrals of complaints to Disciplinary Tribunal in 2010 (see Table 5).

## Outcomes

- 2.38 **Outcomes > Internal**: Table 7 shows the final outcome recorded for all internal complaints closed in 2011. The proportion of internal complaints concluded following disciplinary action fell from the level of 65-75% seen in 2009 and 2010 to 44% in 2011. This resulted from an elevated number of decisions to dismiss with advice – particularly the EM decisions on practising certificate cases – and a slight increase in the number of

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<sup>13</sup> Policy: “PG09 – Initial Assessment of External Complaints”

complaints withdrawn. Withdrawals of internal complaints occur in the main where an incorrect referral has been made or the complaint has been resolved shortly after the complaint is raised. In 2011 there were also four cases withdrawn where the barrister was disbarred on another matter; leaving the BSB with no jurisdiction to continue with the existing complaint.

**Table 7: Final outcome of internal closures – annual comparison<sup>14</sup>**

Outcome	2010	% Total	2011	% Total
Dismissed (with Advice)	1	0.5%	67	26.3%
Dismissed / Withdrawn / Other	49	24.1%	70	27.5%
<b>Up to Committee closure sub-total</b>	<b>50</b>	<b>24.6%</b>	<b>137</b>	<b>53.7%</b>
Not Proved	8	3.9%	9	3.5%
Proved	145	71.4%	102	40.0%
Struck Out	0	0.0%	1	0.4%
<b>Disciplinary action closure sub-total</b>	<b>153</b>	<b>75.4%</b>	<b>112</b>	<b>43.9%</b>
Other	0	0.0%	6	2.4%
<b>Total</b>	<b>203</b>	<b>100.0%</b>	<b>255</b>	<b>100.0%</b>

2.39 **Outcomes > External:** External complaints followed a similar pattern to previous years, as shown in Table 8, with three quarters of complaints dismissed due in the main to a lack of evidence to support the allegations made. The proportion of all closures ending with charges proved against the barrister remained at the 5% level seen in 2010.

<sup>14</sup> Complaints that have been reopened are excluded

**Table 8: Final outcomes of external closures – annual comparison**

Outcome	2010	% Total	2011	% Total
Closed - Referred to Another Body	0	0.0%	8	2.4%
Reject - Outside Jurisdiction	0	0.0%	4	1.2%
Withdrawn	22	5.9%	19	5.6%
<b>Premature closure sub-total</b>	<b>22</b>	<b>5.9%</b>	<b>31</b>	<b>9.1%</b>
Dismissed	290	77.5%	254	74.9%
Dismissed (with Advice)	0	0.0%	5	1.5%
Dismissed (Chambers)	22	5.9%	9	2.7%
NFA	2	0.5%	0	0.0%
No Decision Possible	1	0.3%	1	0.3%
Upheld (Chambers)	2	0.5%	3	0.9%
Upheld (Fine)	0	0.0%	3	0.9%
Upheld (Warning)	4	1.1%	3	0.9%
<b>Up to Committee closure sub-total</b>	<b>321</b>	<b>85.8%</b>	<b>278</b>	<b>82.0%</b>
Not Proved	4	1.1%	8	2.4%
Proved	22	5.9%	18	5.3%
Struck Out	2	0.5%	2	0.6%
<b>Disciplinary action closure sub-total</b>	<b>28</b>	<b>7.5%</b>	<b>28</b>	<b>8.3%</b>
Other	3	0.8%	2	0.6%
<b>Total</b>	<b>374</b>	<b>100.0%</b>	<b>339</b>	<b>100.0%</b>

2.40 Table 9 shows the outcomes for the ten most frequently occurring external aspects and shows the same pattern highlighted in the Annual Report for 2010 whereby at least 80% of cases featuring each aspect are dismissed due to lack of evidence. The one clear exception within this list is “holding out” with nearly 50% of complaints of this nature being upheld. Such allegations are more likely than other types of complaint to have documentary evidence readily available to support the allegations.

**Table 9: Outcomes of the ten most frequently occurring aspects for external complaints closed in 2011**

Aspect Description	Total Closed <sup>15</sup>	Dismissed %	Upheld %	NFA %	Withdrawn %	Other <sup>16</sup> %
Dishonesty/discreditable conduct	123	83.7%	2.4%	0.0%	5.7%	8.1%
Misleading the Court	96	91.7%	3.1%	0.0%	4.2%	1.0%
Rudeness/misbehaviour out of Court	37	91.9%	5.4%	0.0%	2.7%	0.0%
Other	34	91.2%	2.9%	0.0%	2.9%	2.9%
Rudeness/misbehaviour in Court	29	89.7%	3.4%	0.0%	6.9%	0.0%
Fee dispute	26	73.1%	11.5%	0.0%	7.7%	7.7%
Non-practising barrister holding out	19	47.4%	47.4%	0.0%	5.3%	0.0%
Incompetence	17	100.0%	0.0%	0.0%	0.0%	0.0%
Conspiracy/Collusion	10	100.0%	0.0%	0.0%	0.0%	0.0%
Discrimination	10	100.0%	0.0%	0.0%	0.0%	0.0%

2.41 **Outcomes > Disciplinary Action:** Table 10 shows that of the 123 complaints closed in 2011 following referrals to Disciplinary Tribunal, charges were proved in 84% (103) of cases. This is lower than the 93% proven rate from 2010. Of the 20 cases that were not upheld, 16 were dismissed at the hearing whereas 3 concluded at the directions stage and 1 was withdrawn. The reasons for the dismissals at Disciplinary Tribunal range from the Tribunals determining that the conduct in question does not amount to misconduct to Tribunals not being satisfied with the evidence, particularly live witness evidence, and, in some cases, not being able to prove to the criminal standard. Situations have also occurred whereby witnesses have refused to give evidence at the last minute or changed their account of events late in the day.

2.42 As with dismissals there is a clear disparity between external and internal complaints with 39% (11) of external complaints resulting in no charges being proved compared with 9% (9) of internal complaints. This suggests that even though the BSB dismissal rate for external complaints stands at approximately 75%, where such complaints have been referred to disciplinary action there is an increasing trend in charges arising from the complaints failing to be proved in front of an independent panel. It is important that lessons are learnt from the cases where charges are dismissed and staff reviews are carried out. Further, in 2011 the PCD organised an event with the BSB prosecutors, in part to see what lessons could be learnt from them regarding the preparation and presentation of cases.

<sup>15</sup> Total closed refers to the number of complaints with one or more of the aspect alleged

<sup>16</sup> "Other" includes aspects that are ongoing having been reopened

**Table 10: Outcomes of complaints closed at disciplinary action – annual comparison**

Decision Source	2009		2010		2011	
	Complaints Closed	Proved	Complaints Closed	Proved	Complaints Closed	Proved
Adjudication Panel	4	75.0%	4	25.0%	0	-
Determination by Consent	17	100.0%	17	100.0%	18	100.0%
Disciplinary Tribunal	81	87.7%	161	92.5%	123	83.7%
Summary Hearing	104	92.3%	0	-	0	-

2.43 Table 11 shows the outcomes for the ten most frequently occurring charges and shows that where charges have been raised, overall 80%+ have been proved which reflects the pattern seen in previous years. The exception in 2011 (and also in 2010) was “Acting in a manner likely to bring the profession into disrepute”<sup>17</sup>. This charge was upheld in only 10 of the 21 cases and of the cases not proved, 10 were in relation to external complaints. Six of the charges were dismissed by the Disciplinary Tribunal panel either on the grounds of insufficient evidence or on the basis that the panel did not consider the offence to be serious enough to amount to misconduct. In two of these cases, the original recommendation at Committee stage was that the complaint only involved issues of service. However, such recommendations should be recognised as a starting point for debate and the decision of the full Committee in these instances was that the matters should be referred as professional misconduct.

**Table 11: Outcomes of the ten most frequently occurring charges for complaints closed in 2011**

Charge Description	Total Closed <sup>15</sup>	Dismissed %	Upheld %	Withdrawn %	Other %
Failure to complete CPD	43	2.3%	93.0%	2.3%	2.3%
Failing to respond promptly to a complaint	29	10.3%	72.4%	13.8%	3.4%
Being dishonest or otherwise discreditable	26	7.7%	84.6%	3.8%	3.8%
Failing to pay non-disciplinary fine	25	12.0%	80.0%	4.0%	4.0%
Acting in a manner likely to bring prof into disrepute	21	28.6%	47.6%	14.3%	9.5%
Failure to renew practising certificate	16	18.8%	81.3%	0.0%	0.0%
Failing to comply with a sentence of a tribunal	13	0.0%	84.6%	15.4%	0.0%
Failure to comply with practising req following w/f	11	9.1%	90.9%	0.0%	0.0%
Practising without a practising certificate	6	0.0%	100.0%	0.0%	0.0%
Acting uninstructed	6	16.7%	66.7%	16.7%	0.0%

<sup>17</sup> Paragraph 301(a)(iii) of the Code of Conduct

2.44 Table 12 sets out the sentences imposed in relation to complaints closed during 2011 following disciplinary action. A total of 14 complaints resulted in disbarments in 2011 compared with 9 in 2010. These applied to 12 individual barristers with circumstances relating to: criminal convictions (4), multiple breaches of the Code (6), CPD (1) and failure to comply with a sentence imposed by a Disciplinary Tribunal (1).

**Table 12: Complaints closed following disciplinary action by sentence – annual comparison**

Sentence	2010	% Total	2011	% Total
Advised	16	9.6%	13	10.7%
Complete CPD	19	11.4%	13	10.7%
Costs Order	129	77.7%	88	72.7%
Disbarred	9	5.4%	14	11.6%
Fined	90	54.2%	59	48.8%
No further action	3	1.8%	7	5.8%
No separate penalty	18	10.8%	9	7.4%
Other	9	5.4%	12	9.9%
Reprimanded	23	13.9%	28	23.1%
Suspended	56	33.7%	22	18.2%
<b>Total Complaints Closed</b>	<b>166</b>	<b>-</b>	<b>121</b>	<b>-</b>

2.45 Costs orders in favour of the BSB were made in 73% of cases and fines in 49% of cases. These are in line with the 2010 figures once the number of disbarments is taken into account<sup>18</sup>. Non-compliance figures currently stand at:

- i. Fines: 5% (11 cases still in the compliance phase)
- ii. Cost orders: 6% (11 cases still in the compliance phase)

Non-compliance figures for these sentences in 2010 were 22% and 20% respectively, so with only a small number of complaints still in the compliance phase there are promising signs that the 2011 figures will show an improvement.

## Appeals

2.46 At the time of the 2010 Annual Report, the number of ongoing appeals against decisions of Disciplinary Tribunals stood at 32 and continued to rise over the first half of 2011. The difficulty in clearing the backlog arose from the fact that the appeal jurisdiction lies with the Visitors to the Inns of Court. The Visitors are independent of the BSB and exercise a

<sup>18</sup> Normally when a sentence of disbarment is pronounced no separate penalties are applied.

jurisdiction separate to the standard court system involving Judges of the High Court sitting with lay and barrister members. With the pressures on the court system, the Visitors have increasingly found it difficult to allocate judges to appeal cases. While the decision has been taken in principle to transfer the Visitors jurisdiction to the High Court and a legislative vehicle has now been found to do this, the jurisdiction is likely to remain in place for at least another year. To address the backlog in the meantime, the Council of the Inns of Court (COIC) put together a panel of retired High Court and Court of Appeal judges to assist the Visitors. The panel only started hearing cases towards the end of 2011.

- 2.47 New appeals were lodged by barristers in relation to 15 disciplinary cases in 2011; and heard in relation to 13 complaints. However, when appeals that were withdrawn/struck out and the four appeals heard in early 2012 are taken into account, the number of complaints awaiting an appeal hearing fell from 32 at the time of the 2010 Annual Report to a current figure of 21. This is an encouraging indication that the panel of retired judges is already having an impact on clearing the backlog of outstanding appeals.
- 2.48 Of the 13 appeals that were heard in 2011, 6 (46%) were allowed. Of these: 3 complaints had their sentence reduced and 3 were quashed although the quashed findings were in relation to linked cases against a single barrister.

### **Revenue arising from the complaints and disciplinary system**

- 2.49 Fines imposed and costs orders against barristers totalled £144.5K in 2011 compared with £195K in 2010 (after adjustments). This represents £26K in administrative fines – a 42% decrease on 2010 due to the late referral of the CPD breaches in 2011 – £82K in disciplinary fines and £36.5K in costs. The figures for fines and costs are approximately 20% lower than 2010 which is generally to be expected considering the 30% reduction in the number of cases. In total £101K was received, covering fines and costs issued in 2011 and outstanding previous amounts.

## Turn Round Times and Throughput of Complaints

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- 3.1 This section covers the turn round times for complaints closed as well as the performance of the PCD in terms of the volume of cases progressed during the year. As many complaints closed in 2011 will have been opened prior to the restructure of the department and the introduction of new processes in January 2011, it is difficult to assess the impact of the restructure from the overall turn round times. Therefore, a separate sub-section (starting at paragraph 3.36) reviews complaints opened and stages commenced since January 2011 in order to determine if the restructure has created improvements in the system.
- 3.2 **Timelines:** Throughout 2011 the department has also been working on a set of standard timelines covering each stage of the complaints process. The timelines are benchmarks of the length of time each step of the process should take, all things being equal, provided all parties co-operate and comply with the complaints procedures.
- 3.3 Much of the work on the timelines was completed in 2009 as part of the implementation of the Strategic Review and further development took place during the restructure proposals in 2010. However these theoretical standards were not fully implemented and actual performance was not benchmarked against those figures. In July and August of 2011 the timelines were revised based on an assessment of each step of the complaints process by the Assessment and Investigations & Hearings teams of the PCD. Between September and December the draft timelines were discussed by the Office Holders of the Committee and managers of the PCD – and reported to the Independent Observer for comment – with an agreement reached in early 2012.
- 3.4 The timelines have been used to calculate end to end times for concluding complaints according to the stage of the process at which this happens. In summary, these are set out in Table 13.

**Table 13: PCD service standards for conclusion of cases**

Complaint Outcome	External Complaints	Internal Complaints
<b>Complaints concluded without a referral to disciplinary action</b>		
Dismissal without investigation	1 month	N/A
Dismissal following investigation	5 months	3.5 months
<b>Complaints concluded following disciplinary action</b>		
Concluded following the DBC procedure	N/A	6.75 months
Concluded following a three-person Disciplinary Tribunal	13.5 months	8 months
Concluded following a five-person Disciplinary Tribunal	15 months	13.5 months



3.5 The timelines will be applied to the assessment of performance from January 2012 onwards. While they have not been used to benchmark performance for 2011, the sections below are broken down into the stages that will be used in all future reporting.

### **Turn Round Times**

3.6 The standard complaints process potentially involves three main stages. These are pre-investigation (where complaints are assessed for potential breaches of the Code of Conduct), investigation and then disciplinary action. Complaints can be closed following any of these stages or referred onto the next stage.

3.7 The paragraphs below, concerning turn round times, are divided into five sub-sections according to the stage of the process at which complaints in 2011 were closed and the source of the complaint:

- i. Pre-Investigation Dismissals (External)
- ii. Post-Investigation Dismissals<sup>19</sup> (External)
- iii. Post-Investigation Dismissals<sup>19</sup> (Internal)
- iv. Disciplinary Action (External)
- v. Disciplinary Action (Internal)

Where a complaint falls into any other category, such as cases withdrawn or referred to chambers, the figures are excluded from the statistics on turn round times as they are generally outside the control of the department and would distort the figures in relation to BSB performance. Likewise complaints involving any unusual circumstances resulting in the premature closure of a complaint, such as Disciplinary Tribunal referrals struck out at the directions stage, have been excluded.

### **Turn Round Times– Pre-Investigation Dismissals: External**

3.8 The pre-investigation stage was one of the areas most radically affected by the restructure of the complaints processes, with the Assessment Team now authorised to dismiss complaints that would formerly have been dismissed by the Complaints Commissioner. There was, therefore, a possibility that the overall turn round times for the year would show an improvement that could be directly linked to the restructure.

3.9 Table 14 shows that overall the figures remained comparable to 2010 with 62% (90) of complaints closed inside 3 months compared with 67% (80) in 2010. However, closer analysis of this group reveals that the proportion of complaints closed within 30 working days was much greater in 2011 with 44% (64) of closures achieved within this timescale

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<sup>19</sup> Investigation and Professional Conduct Committee closures. Also includes decisions to issue a warning and “no further action” decisions

compared with just 27% (32) in 2010. Therefore, where a quick decision was possible, there is evidence to suggest that turn round times have improved. This is explored further in the restructure statistics starting at paragraph 3.36.

**Table 14: Turn round times for external pre-investigation dismissals – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 3 months	3 - 6 months	Over 6 months	Average Days
2009	135	46.7%	33.3%	20.0%	65
2010	119	67.2%	23.5%	9.2%	42
2011	146	61.6%	26.7%	11.6%	36

3.10 It is important to note that 100 external pre-investigation complaints were carried over from 2010 and these will have had an impact on the 2011 figures. As such it is difficult to say anything about the restructure from these figures. Nonetheless, over the course of the year it was hoped that the turn round times for pre-investigation dismissals would have shown a general improvement over 2010. This has not entirely been the case due to factors such as the prioritisation given to outstanding IPS complaints and the steep learning curve following the restructure, however the fourth quarter figures did display a marked improvement with 78% (29) of complaints closed within 3 months and no complaints taking longer than 6 months to dismiss. Of the 98 complaints carried over into 2012, 77% (75) were less than 3 months in age at the time.

### Turn Round Times – Post-Investigation Dismissals: External

3.11 Table 15 shows that turn round times for post-investigation dismissals increased overall compared with 2010 with 39% (29) of complaints taking more than 12 months to conclude compared with 24% (16) in 2010. The reasons for this are explored below.

**Table 15: Turn round times for external post-investigation dismissals – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 6 months	6 - 12 months	Over 12 months	Average Days
2009	76	26.3%	56.6%	17.1%	166
2010	68	27.9%	48.5%	23.5%	177
2011	74	17.6%	43.2%	39.2%	206

3.12 Table 16 sets out the figures for complaints dismissed by PCD staff and Experienced Members of the Committee following the investigation stage of the complaints process. Prior to 2011 such decisions would have been made by the Complaints Commissioner. In 2011, the proportion of complaints closed within 6 months (43%) increased compared with 2010 (35%); returning to 2009 levels thus indicating an improvement in the time taken to investigate relatively straightforward complaints. However, complaints taking over 12 months to be dismissed following investigation remained at around 15% and as a result the overall picture is broadly the same as in 2010. Analysis of the three complaints taking over 12 months to be dismissed in 2011 reveals that all three involved complexities requiring referral to a sponsor member of the Committee for advice (which inevitably added to the overall time) but equally all three suffered delays at the initial stages in chasing and receiving updates for information from the complainants.

**Table 16: Turn round times for external staff and EM dismissals – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 6 months	6 - 12 months	Over 12 months	Average Days
2009	46	43.5%	50.0%	6.5%	148
2010	40	35.0%	50.0%	15.0%	152
2011	21	42.9%	42.9%	14.3%	133

3.13 Table 17 sets out the figures for complaints dismissed at the Committee stage of the complaints process. Complaints took longer to close in 2011 with 49% (26) of complaints taking more than 12 months to conclude compared with 36% (10) in 2010. It should be noted that under the restructured processes, only the most difficult matters are now going to the Committee so a small increase in turn round times was to be expected.

**Table 17: Turn round times for external Committee dismissals – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 6 months	6 - 12 months	Over 12 months	Average Days
2009	30	0.0%	66.7%	33.3%	210
2010	28	17.9%	46.4%	35.7%	201.5
2011	53	7.5%	43.4%	49.1%	242

3.14 There were a number of factors that led to 26 external Committee closures taking more than 12 months to conclude. In eight of these cases the delays occurred at the pre-

investigation and investigation stages with no delays at the Committee stage. In the remaining cases, the Committee stage took 3 months or more to conclude but these included seven linked complaints from a single complainant which understandably took longer than usual to progress. Other areas that resulted in a longer turn round time included: complainants and barristers supplying more information after the investigation had concluded (3), outcomes requiring the barrister to attend upon the chair of the Committee (2) and a further 6 cases involving a protracted time in obtaining Committee notes from Sponsors.

- 3.15 Barrister members of the Committee act as Sponsors for complaints heard at Committee meetings; reviewing the file, writing a Committee note and presenting the note at the meeting. Turn round times for Sponsor notes showed a slight improvement in 2011 compared to 2010 with 34% of notes for external complaints completed within one month compared with 29% in 2010 so there is no suggestion that the performance of the Committee itself suffered in 2011.

### Turn Round Times – Post-Investigation Dismissals: Internal

- 3.16 The restructure of the complaints process in January 2011 gave Experienced Members of the Committee the ability to take decisions to dismiss internal complaints with the option to advise the barrister about their future conduct.
- 3.17 Table 18 shows that turn round times for post-investigation dismissals of internal complaints were similar to 2010 with 81% (83) of closures happening within 6 months of opening compared with 88% (28) in 2010.

**Table 18: Turn round times for internal post-investigation dismissals – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 6 months	6 - 12 months	Over 12 months	Average Days
2009	45	75.6%	22.2%	2.2%	64
2010	32	87.5%	12.5%	0.0%	79
2011	103	80.6%	14.6%	4.9%	71

- 3.18 In the past, dismissals without the involvement of the full Committee have been rare but were common in 2011 primarily because of the number of complaints dismissed (with formal advice being given) by Experienced Members in relation to defaults in making PCF payments by instalments. Dismissals without a referral to the Committee occurred within 6 months of the opening of the complaint in 88% (81) of cases.

3.19 Table 19 sets out the figures for internal Committee dismissals. From the date of referral to the Committee, 36% (4) of complaints were concluded within 2 months compared with 68% (19) in 2010. However, as with the external complaints, under the restructured processes it is the more difficult cases that have been referred to the Committee in 2011.

**Table 19: Turn round times for internal Committee dismissals – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 6 months	6 - 12 months	Over 12 months	Average Days
2009	21	57.1%	38.1%	4.8%	92
2010	28	85.7%	14.3%	0.0%	78
2011	11	18.2%	45.5%	36.4%	160

3.20 Of the 11 internal complaints dismissed by the Committee in 2011, five took more than eight months to be concluded. With such small numbers these cases impacted significantly on the turn round times. In three of these cases there were delays at the Committee stage: one was affected by queries raised by the barrister but of more concern were two complaints which took more than a year to conclude purely due to an avoidable delay within the PCD. This also applied to one of the remaining two complaints delayed at the investigation stage. Steps have been taken to rectify the issues which led to the delay in these complaints.

### **Turn Round Times – Disciplinary Action: External**

3.21 Table 20 shows that turn round times for external complaints following disciplinary action remained at a similar level to 2010 with 50% (7) of complaints taking more than 18 months to conclude. This continues to demonstrate that, where such complaints are referred for disciplinary action, external complaints are taking considerably longer to close than internal complaints. Any improvements made to the system have been counteracted by the increasingly litigious nature of disciplinary proceedings: an increase in the number of barristers who are represented by solicitors and a rise in the number of challenges to the processes. By contrast, charges in relation to internal complaints are likely to be more straightforward to progress and less susceptible to challenge.

**Table 20: Turn round times for external complaints following disciplinary action – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	13	15.4%	30.8%	53.8%	366
2010	11	0.0%	45.5%	54.5%	372
2011	14	7.1%	42.9%	50.0%	374

3.22 Tables 21 and 22 set out the figures for external complaints closed at three-person and five-person Disciplinary Tribunals. For three-person Disciplinary Tribunals, no cases were closed with 12 months (in stark contrast to the closure of internal cases – paragraph 3.26). There is some evidence though of an improvement in turn round times with 56% (5) of complaints concluded within 18 months compared with 33% (2) in 2010. However, with such small numbers the individual circumstances of each complaint make direct comparisons difficult.

**Table 21: Turn round times for external complaints heard at three-person Disciplinary Tribunal – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	1	0.0%	0.0%	100.0%	387
2010	6	0.0%	33.3%	66.7%	390.5
2011	9	0.0%	55.6%	44.4%	342

**Table 22: Turn round times for external complaints heard at five-person Disciplinary Tribunal – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	12	16.7%	33.3%	50.0%	335.5
2010	5	0.0%	60.0%	40.0%	356
2011	5	20.0%	20.0%	60.0%	395

3.23 The Disciplinary Tribunal stage itself took less than 12 months in 78% (7) of three-person cases compared with 67% (4) in 2010. Five-person Tribunals showed a similar pattern with four out of five complaints turned round within 12 months after being referred, although the numbers of complaints are too small to determine whether any improvements have been made.

**Turn Round Times – Disciplinary Action: Internal**

3.24 Internal complaints closed following disciplinary action displayed a mixed picture in 2011 which overall resulted in similar turn round times to 2010; with 47% (51) of complaints concluded within 12 months compared to 43% in 2010. However, as Table 23 shows, the proportion of complaints taking more than 18 months to conclude returned to 2009 levels – caused for the most part by delays with five-person Disciplinary Tribunals (see paragraph 3.28).

**Table 23: Turn round times for internal complaints following disciplinary action – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	52	57.7%	26.9%	15.4%	240
2010	152	43.4%	50.0%	6.6%	252
2011	108	47.2%	37.0%	15.7%	246.5

3.25 **Determination by Consent:** Table 24 sets out the figures for internal DBC closures, and illustrates that while the number of cases is small there was an improvement overall compared with 2010. Of all complaints closed by the procedure, 75% (12) were closed within 12 months compared with 57% (8) in 2010. The DBC stage itself took less than 6 months in 75% (12) of cases compared with 50% (7) in 2010.

**Table 24: Turn round times for internal complaints resolved by DBC – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	17	82.4%	17.6%	0.0%	193
2010	14	57.1%	42.9%	0.0%	232.5
2011	16	75.0%	12.5%	12.5%	200.5

3.26 **Three-person Disciplinary Tribunals:** Table 25 sets out the figures for internal three-person Disciplinary Tribunal closures, and shows that in contrast to the external complaints, 44% (30) of cases were closed with 12 months with less than 10% of cases taking longer than 18 months from start to finish. These are broadly comparable figures to 2010.

**Table 25: Turn round times for internal complaints heard at three-person Disciplinary Tribunal – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	10	40.0%	40.0%	20.0%	249
2010	98	38.8%	54.1%	7.1%	264
2011	68	44.1%	47.1%	8.8%	268

3.27 Again the Disciplinary Tribunal stage itself took a similar time to 2010, although with 44% of Tribunals concluded within 6 months compared with 25% in 2010 there are signs of improvement.

3.28 **Five-person Disciplinary Tribunals:** Table 26 sets out the figures for internal five-person Disciplinary Tribunal closures, and shows that this area suffered in 2011 with 38% (9) of complaints taking more than 18 months to conclude. Four of these cases were only marginally over 18 months – caused by small delays in chasing responses and two linked complaints against a barrister who was subsequently disbarred. Of the remaining five: two were delayed pending the findings of other bodies and one saw the conclusion of one of the longest running complaints in BSB history. In all of these cases there were, therefore, good reasons for the delays. However, there were two linked complaints against a single barrister which took more than 18 months to conclude purely because of an avoidable delay within the PCD (as in paragraph 3.20). Steps have been taken to rectify the issues surrounding this complaint.



**Table 26: Turn round times for internal complaints heard at five-person Disciplinary Tribunal – annual comparison**

Year	Complaints Closed	Turn Round Time (Working Days)			
		0 - 12 months	12 - 18 months	Over 18 months	Average Days
2009	25	48.0%	28.0%	24.0%	245
2010	40	50.0%	42.5%	7.5%	240.5
2011	24	37.5%	25.0%	37.5%	284.5

### Throughput of Cases in 2011

- 3.29 The following paragraphs assess the number of complaints that were “live” within the department in 2011; and ultimately the number that were carried over into 2012. Large volumes of complaints inevitably create delays in the complaints process, so the aim is simply to ensure that the overall caseload remains manageable with the resources available to the PCD.
- 3.30 There were a total of 1000 active complaints within the PCD in 2011 – 391 carried over from 2010 and 609 complaints opened or reopened. Table 27 indicates that, of these, 61.3% were closed in the same period. This is effectively the same figure as for 2010, so overall throughput has been maintained but not significantly improved following the restructure.

**Table 27: Throughput of complaints – annual comparison**

Year	2009	2010	2011
Active Complaints	1123	983	1000
Complaints Closed	657	592	613
<b>Closure Rate</b>	<b>58.5%</b>	<b>60.2%</b>	<b>61.3%</b>
Complaints carried over into next year	466	391	387

- 3.31 The repercussion of this is that 387 complaints were carried over into 2012 compared with 391 carried over in the previous year, so the overall caseload has not changed. However, as outlined in the following paragraphs, the complaints carried into 2012 were weighted more heavily towards internal complaints (52% compared with 43% in the previous year).
- 3.32 **External:** A slightly higher proportion of external complaints were closed in 2011 compared with 2010 at 65.4%. As the number of new external complaints was lower in

2011, this resulted in the number of external complaints being carried over to the next year decreasing from 223 in 2010 to 187. In total, 47% of complaints carried over into 2012 were less than 3 months in age. These factors indicate that the external caseload is under control.

- 3.33 **Internal:** The proportion of internal complaints closed also increased slightly over 2010 to 56.4%. However, had it not been for the closure of a large number of practising certificate cases by Experienced Members in the fourth quarter of 2011 (paragraph 2.30), the throughput of internal complaints would have been considerably lower than 2010. By dismissing 58 cases in this way, the throughput of complaints was maintained and a potentially damaging situation resulting from such a large volume of internal complaints moving through the complaints process was to some extent avoided. The end result was 200 complaints were carried over into 2012 compared with 168 in the previous year.
- 3.34 However, it should be noted that the timing of the CPD referrals only allowed eight complaints to be raised in 2011 so these figures do not include a further 26 complaints (to date) converted from existing Warnings & Fines records in early 2012 and an unknown number of further CPD referrals which would normally have been expected to be received by the PCD in mid-2011. Therefore, while the throughput of internal complaints was under control at the end of 2011, this picture is likely to change in 2012 when the main bulk of the of CPD referrals arising from 2010 breaches will be received. The Third Quarter Report<sup>20</sup> highlighted that evidence exists to show that in recent years a large number of internal complaints moving through the system en-masse causes delays not only in progressing those complaints but also in progressing other complaints at the same stage of the process.
- 3.35 Overall, there is a high probability that by the middle of 2012 the large majority of active complaints within the department will be internal complaints; the volume of which will almost certainly have a negative impact on both internal and external turn round times.

### **Post-Restructure Performance**

- 3.36 Many of the turn round times analysed above present a picture of little change between the 2010 figures under the old complaints and disciplinary system and the 2011 figures under the restructured system introduced in January 2011. However, with 39% of the active complaints in 2011 having been carried over from before the restructure it is difficult to establish if the restructure is making a difference from the overall turn round times. Therefore the following paragraphs refer only to the complaints received after 1 January 2011 or, where individual stages of the process are analysed, stages commencing after 1 January 2011. The end of year statistics can then be compared with

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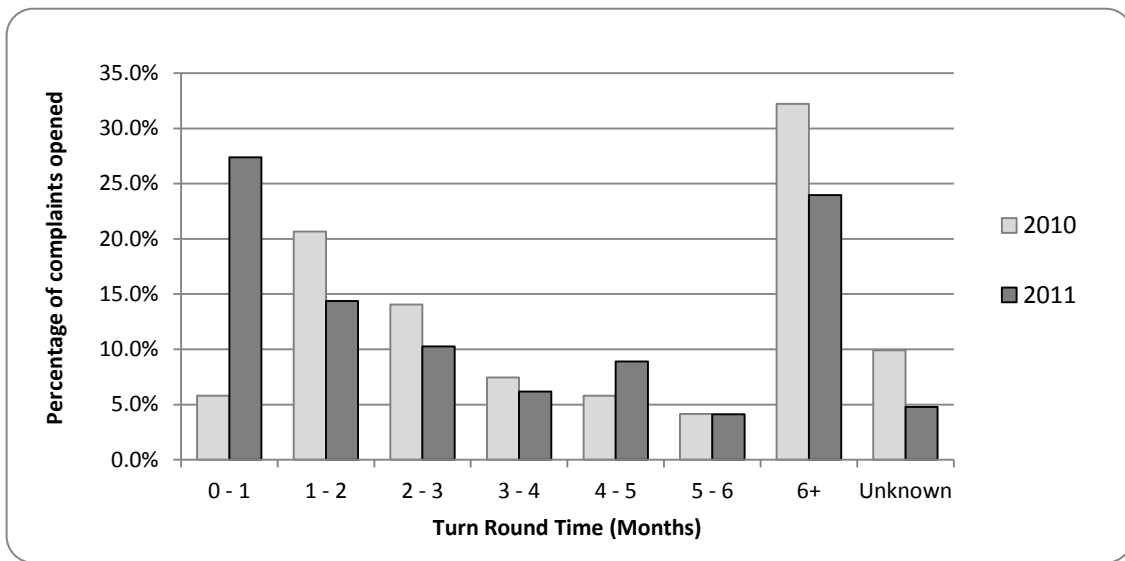
<sup>20</sup> Professional Conduct Department: Trends and Performance Report, Third Quarter 2011; Paragraphs 3.10-3.12

those of the previous year over the same period. Complaints involving elements of IPS are excluded from all calculations.

➤ **Turn Round Times**

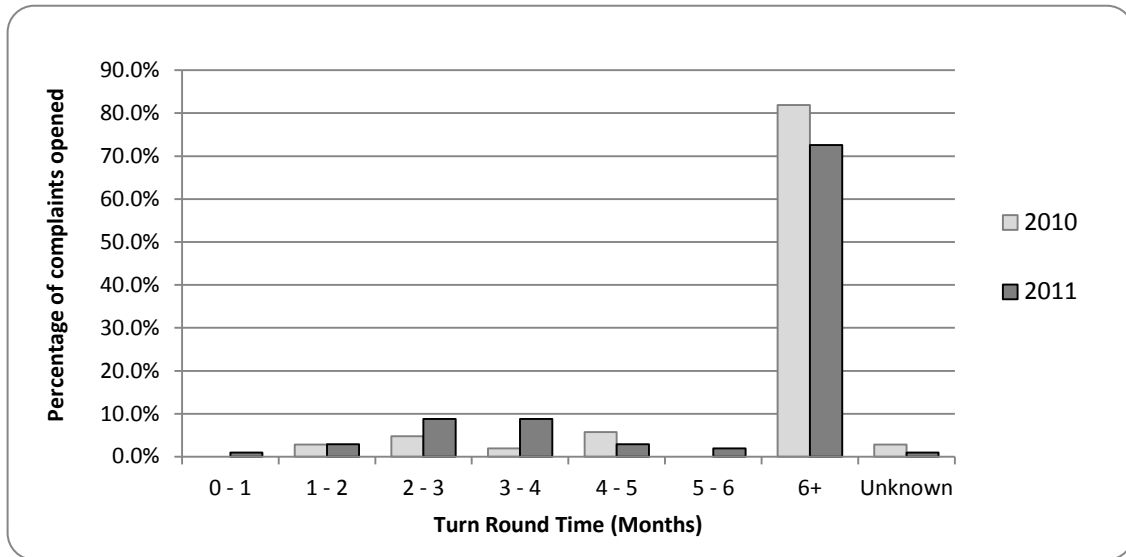
3.37 Figures 6 and 7 illustrate the turn round times for all new complaints opened in the first six months of 2011 compared with 2010. Selecting only those complaints opened in the first half of the year, the majority of which should have either been closed or referred to disciplinary action by the end of the year, it is possible gauge whether the restructured gauge whether the restructured system is operating effectively to improve performance.

**Figure 6: Turn round times for external complaints opened in the first half of 2011 vs. 2010**



3.38 **External:** Of complaints received in the first six months of 2011, 27% (40) were closed within one month compared with 6% (7) in 2010. This is a clear improvement over the old structure and this is confirmed by the fact that, by the end of the year, 81% of 2011 complaints were closed compared with 65% in 2010.

**Figure 7: Turn round times for internal complaints opened in the first half of 2011 vs. 2010**



3.39 **Internal:** While the majority of internal complaints would not be expected to have been closed within six months due to the high referral rate to disciplinary action, 26% (27) were closed within six months in 2011 compared with 15% (16) in 2010. By the end of the year, 54% of complaints were closed compared with 23% of complaints in 2010.

3.40 The significance in the higher closure rate comes when looking at the number of complaints concluded following Disciplinary Action. In 2011, ten of the practising certificate referrals opened in May 2011 made it all the way to Disciplinary Tribunal and closure within the same calendar year. For comparison, in 2010 no practising certificate or CPD referrals were concluded in this way, demonstrating a clear improvement in the process.

➤ **Stage Times**

3.41 Analysis of the time taken for individual stages of the process to be completed gives a more detailed picture of any improvements than the overall figures quoted above. In this case the statistics are drawn from all stages that both started and finished (either with the complaint closed or referred to the next stage) in 2011 compared with 2010. It should be noted that due to the setup of the complaints database in 2010, a section of data for some stages in that year (particularly at investigation) had to be excluded on the grounds of poor data quality so these figures should only be taken to be a reasonable indicator of the true picture. Table 28 sets out the turn round times for stages of the process in 2011.

**Table 28: Turn round times for stages starting and finishing within a calendar year – annual comparison**

Stage Type		2010	2011	Comparison with 2010
<b>Pre-Investigation &gt; Stages completed within 20 days</b>				
External	Referral to next stage	35%	67%	↑
External	Closure	21%	46%	↑
Internal	Referral to next stage	93%	84%	↓
Internal	Closure	-	-	-
<b>Investigation &gt; Stages completed within 60 days</b>				
External	Referral to next stage	39%	48%	↑
External	Closure	55%	27%	↓
Internal	Referral to next stage	76%	68%	↓
Internal	Closure	-	82%	-
<b>Professional Conduct Committee &gt; Stages completed within 40 days</b>				
External	Referral to next stage	44%	47%	↑
External	Closure	67%	29%	↓
Internal	Referral to next stage	89%	96%	↑
Internal	Closure	60%	33%	↔*
<b>Determination by Consent &gt; Stages completed within 80 days</b>				
Internal	Closure	0%	69%	↑
<b>3 Person Disciplinary Tribunal &gt; Stages completed within 120 days</b>				
External	Closure	-	-	-
Internal	Closure	26%	64%	↑
<b>5 Person Disciplinary Tribunal &gt; Stages completed within 180 days</b>				
External	Closure	-	-	-
Internal	Closure	100%	33%	↓

\* Only 3 complaints analysed in 2011

- 3.42 The clearest improvements can be seen in the pre-investigation stage where the authorisation given to the Assessment Team to close complaints and refer complaints on to investigation has proved to be more efficient than channelling all complaints through a Complaints Commissioner.
- 3.43 The time taken for investigation stage referrals – both internal and external – remained similar when compared with 2010, despite the extra work involved in making direct

referrals to the Committee and to disciplinary action. However, the time taken for the investigations stage in closing external complaints slowed. While an examination of the 2011 complaints reveals the high degree of liaison that has gone on between PCD Case Officers and sponsors from the Committee, this is an area of concern and will be analysed further both in 2012 as more data becomes available and as part of the upcoming restructure review project.

- 3.44 The results for the other stages tend to mirror the findings from the *turn round times* section, with: the Committee showing varying performance due to the factors listed in paragraphs 3.14 and 3.20 and the necessary cancellation of four meetings; a general improvement in the time taken for the DBC procedure; an improvement in the time taken for three-person Disciplinary Tribunals and some issues with individual cases in the small number of five-person Disciplinary Tribunals. It should be noted that in the case of Disciplinary Tribunals, the procedure that the prosecution must follow does not provide sufficient time to close the majority of stages commencing in any calendar year.
- 3.45 In summary, the stage times give a mixed picture with regards to comparing 2011 performance with 2010 but there are clear signs of improvement at pre-investigation, Determination by Consent, and in straightforward Disciplinary Tribunals.
- 3.46 This method of analysis has limitations in comparing 2011 with 2010 due to the significant differences in the stages of the complaints processes, but should become more useful in 2012 as direct like-for-like comparisons can be made with 2011. However, when combined with the turn round times in paragraphs 3.38 – 3.40 there is evidence to suggest that the restructured processes are producing improvements in the time taken to progress and close complaints, which should be borne out in future reports. An internal review of the efficacy of the restructured processes is currently being undertaken which includes a review of the Committee structure. The results will be reported later in the year.

## Independent Observer

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- 4.1 In 2009, as result of the Strategic Review of the complaints and disciplinary processes, the BSB created the role of Independent Observer (IO). This post is a part time appointment which reports to the Governance, Risk and Audit Committee of the BSB (and previously the Performance and Best Value Committee). The IO is tasked with assessing all aspects of the complaints and disciplinary system in order to ensure that it is operating effectively in line with the procedures and good practice.
- 4.2 In May 2011, Isobel Leaviss, the second IO was appointed following a short break in appointments. She reported twice to the PBVC in 2011 and gave the work of the department a positive assessment commenting on each occasion that:
- potential breaches of the Code are being identified and appropriately pursued;
  - decisions are fair and consistent;
  - communications are clear;
  - decisions are well reasoned;
  - staff are polite and professional in their written contacts.

In her observation of Committee meetings, the PCC was praised for the high quality of debate and inclusive nature with regard to lay members.

- 4.3 The IO has also made a number of recommendations for improving the system such as reviewing the standard letters and amending letters of advice sent to barristers and complainants, regularly reconciling the LeO and BSB databases to check for any discrepancies and expanding the information on complaints handling on the BSB website; all of which have been implemented or are in the process of being implemented.
- 4.4 The work of the IO since May has been highly beneficial in ensuring the system is operating effectively and the recommendations made to date have already resulted in several improvements to the complaints processes and the public facing work of the PCD.

## Conclusions

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- 5.1 2011 was yet another year of substantial change within the complaints and disciplinary system and in the work of the PCD and PCC (formally known as the Complaints Committee). The first half of the year was a challenging one with the introduction of the restructured processes and staff teams. It was a huge learning curve for all those involved and it is to the credit of the staff and the Committee members that the transition to the new structure went so smoothly with relatively little negative impact on overall performance. The restructure coincided with the need to complete as many as possible of the outstanding IPS complaints by the deadline of 31 March 2011. Again, the staff and Committee are to be commended for their hard work in this area which resulted in far fewer cases than predicted being referred to the Acting Legal Services Ombudsman and the consequent decision by the MoJ not to charge for completion of these cases; a saving to the BSB of up to £24,000.
- 5.2 This was also the first full year during which the new Legal Ombudsman service was operational. The introduction of the Legal Ombudsman scheme has had a significant effect on the operation of the Bar's complaints and disciplinary system as some of the statistics in this report demonstrate. Indeed, the restructure was a direct response to the changed landscape. It was accepted that the creation of LeO would result in a reduction in external complaints but it was predicted that the BSB would still be receiving approximately 25% of client complaints via referrals from LeO in relation to conduct issues. However, the level of referrals has been significantly less than predicted and overall amounted to only 3.2% of complaints received by LeO. While this could be a cause for concern, the checks that have been put in place indicate that there are no apparent problems in relation to LeO's assessment of conduct issues. The inevitable conclusion must be that the issues of concern raised by clients about their barristers relate almost entirely to the service they receive rather than the conduct of the barrister: matters which can be adequately addressed by the powers of redress available to the Ombudsman. To some extent this is borne out by the BSB's previous figures in relation to misconduct referrals to disciplinary action arising from client complaints, which were only 3% of the total complaints.
- 5.3 Although the number of referrals in relation to client complaints has been much lower than predicted, this has not led to a substantial reduction in the number of external complaints received. The level of external complaints has been maintained almost entirely by the substantial increase in complaints from litigants in person which rose from 7 in 2010 to 76 in 2011. This trend started in the first quarter of 2011 and has continued at a consistent rate of 17-21 complaints per quarter ever since with no sign of a decrease so far in 2012.
- 5.4 As has been commented on in previous reports, the increase in complaints from litigants in person is likely to be a direct result of the changes in access to legal aid which mean



more people are having to represent themselves. The report from the Civil Justice Council on Access to Justice for Litigants in person concluded that more information and support needs to be provided for such litigants and this is borne out by the PCD's experience of complaints. Over 50% of the complaints received related to misleading the court and of those 70% have been dismissed (with the remainder ongoing) on the basis that they did not reveal a potential breach of the Code. This indicates that there is a substantial level of misunderstanding amongst litigants in person as to the role of opposing counsel. A thematic review of the complaints received from litigants in person is due to be carried out later in 2012 with a view to providing greater feedback to the profession about issues that may arise and establishing if there are any lessons to learn. In the interim, the BSB has made the Bar aware through an article in Counsel magazine.

- 5.5 While external complaint numbers remained relatively static, the workload within the PCD increased due to a substantial increase in referrals in relation to breaches of the practising certificate requirements which went from 11 in 2010 to 169 in 2011; mainly due to the high level of default in relation to the instalment scheme. This number alone took the level of internal complaints raised in 2011 nearly to the total for 2010. However, the extent of the potential increase in internal complaints is masked by the very late referral of breaches of the 2010 CPD requirements which are normally received in April/May each year but, as at March 2012, the main bulk of the referrals have yet to be received.
- 5.6 The statistics in relation to internal complaints outlined in this report highlight the increasing dominance of such complaints within the system. Internal complaints formed almost 50% of the complaints opened in 2011 as compared to 30-35% in previous years. Had the CPD referrals been received during 2011, the percentage of internal complaints is likely to have been nearer 60% and would for the first time have outstripped external complaints received. Further, internal complaints formed over 80% of the cases referred to disciplinary action in 2011. As part of the work in relation to the regulatory standards due to be carried out in 2012, the issue of supervision and enforcement in these areas will be considered in order to ensure that the regulatory action remains appropriate and proportionate.
- 5.7 It was hoped that by the end of 2011 a clear assessment could be made in relation to the impact on the system of the restructure. However, the factors referred to above have to some extent made this difficult. The results are mixed with clear improvements in the time taken to progress complaints in some areas and static results in others resulting in the picture remaining the same as in previous years. However, it is apparent that the cases where there is no evidence of a potential breach of the Code are being turned round more quickly and complainants informed earlier of the outcome. It is also apparent that the new ability for staff to refer cases direct to disciplinary action has created substantial improvements in the time taken to conclude disciplinary action in relation to internal complaints and the average age of complaints carried over into 2012 has gone

down. On the other hand, investigations of external complaints and conclusion of disciplinary action in relation to such complaints are taking longer. The former will be assessed further in 2012 as part of the forthcoming restructure review while the latter has been considerably impacted by a rise in the number of challenges to the processes.

- 5.8 There can be no doubt that the complaints landscape has changed over the last year and the PCD and PCC's work is now centred on dealing with complaints from non-clients and addressing issues arising from breaches of the practising requirements. The Independent Observer's positive assessment of the operation of the system is very encouraging and her recommendations have added to the continual cycle of improvements. The review of the efficacy of the restructured processes will be another opportunity to ensure that the system is working effectively in line with good practice.

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